



Arizona State Senate *Issue Brief*

November 6, 2006

Note to Reader:

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GUBERNATORIAL LINE ITEM VETO AUTHORITY

The Arizona Constitution gives the Governor two distinct veto powers – a general power, which allows veto of an entire bill on any subject, and a line item power. The Governor's power to line item veto certain provisions of legislation is found in Article V, section 7 of the Arizona Constitution, which provides:

[I]f any bill presented to the Governor contains several items of appropriations of money, he may object to one or more of such items, while approving other portions of the bill...

RIOS V. SYMINGTON

As part of a budget balancing plan for the state, Laws 1992, Seventh Special Session, Chapter 3, directed the transfer of monies from 61 special funds to the state General Fund. The Governor line item vetoed five of these transfers. No override vote was taken by the Legislature. Senate President Peter Rios filed a challenge to Governor Symington's authority to line item veto the transfers.

The Arizona Supreme Court considered whether the creation of the special funds from which the transfers were made constituted appropriations and whether the Governor properly could line item veto transfers from the funds.

Citing earlier cases, the Supreme Court held that an appropriation occurs when the Legislature sets aside a certain sum of money for a specified object and creates an authority to spend the money. The Court found that all five of the special funds from which the transfers were made were appropriations. Each one specified a certain sum of money, an object and an authority to spend.

The Court noted that a sum of money need not be specified in each case because the amount contained in each fund can be ascertained at any given time.

The Court then considered whether a transfer from a previously made appropriation (each fund) constitutes "an item of appropriation" subject to the line item veto. Although the Court noted that the transfers back to the state General Fund did not

contain either spending authority or a specified purpose for the money, it held that a reduction or elimination of a previously made appropriation must be subject to the line item veto. If not, the Legislature could make appropriations and then change them by transfers, thereby limiting the Executive's role in the appropriation process.

This case is also noteworthy because the Court determined an increase made by the Legislature to an earlier appropriation is subject to the line item veto because it is, in essence, a new appropriation. The Court also determined that a decrease by the Legislature of an earlier appropriation is subject to the line item veto, which reinstates the previous larger amount appropriated. The Governor cannot, however, line out an item and replace it with a different amount. Additionally, the Governor's veto messages may not direct certain state agencies under the Governor's authority to impound and revert specific appropriated sums. This is a legislative function.

BENNETT V. NAPOLITANO

On June 12, 2003, the Legislature approved and transmitted to Governor Napolitano four bills comprising the state's operating budget for FY 2003-2004 – the general appropriations bill and three omnibus reconciliation bills (ORBs).

On June 17, 2003, the Governor line item vetoed 35 provisions from these bills. On July 15, 2003, the President of the Senate, Speaker of the House of Representatives and majority leaders of both houses brought a special action in the Arizona Supreme Court stating the Governor exceeded her veto authority under the Arizona Constitution.

The Arizona Supreme Court found that petitioners lacked standing to challenge the Governor's vetoes made in connection with the legislative budget package for FY 2003-2004 and that "notions of judicial restraint" required the Court to abstain from deciding the substantive issues.

The Court went on to state, however, that the record contained evidence that a measure of accountability for the dispute properly could be assessed against both parties. The Court found

that even where instances of misuse of the Governor's line item veto power were present, the record also reflected nonrecurring instances of unconventional budget structuring, failure to attempt a legislative override, failure of legislative leaders to obtain authorization from the House and Senate to maintain the action and numerous possible violations of the constitutional single subject rule in the ORBs.

47TH LEGISLATURE V. NAPOLITANO

The 47th Legislature passed House Bill (H.B.) 2661, concerning state employee pay raises, as an emergency measure on January 27, 2006. Section 6 of the act appropriated money for employee salary adjustments, and section 5 of the act made technical changes and exempted certain employees at a pay grade of 24 or above, hired after December 31, 2006, from the state merit system. On January 30, 2006, the Governor line item vetoed the portion of section 5 that exempted certain employees at a pay grade of 24 or above, hired after December 31, 2006, from the state merit system. The Governor's veto message stated that this section would have created an additional expense for the state unrelated to state employee's salaries "[b]ecause of the differences in the way exempt and non-exempt employees accrue annual leave."

The Legislature responded on February 2, 2006. It did not attempt a veto override, but did authorize the President of the Senate and the Speaker of the House of Representatives to bring an action on behalf of the Legislature to challenge the constitutionality of the Governor's line item veto.

The Arizona Supreme Court considered, among other things, whether the substantive portions of section 5 of H.B. 2661 constituted an appropriation. The Court relied on the previous definition of an appropriation – an appropriation occurs when the Legislature sets aside a certain sum of money for a specified object and creates an authority to spend it. The Court also noted, relying on previous case law, that the Legislature can authorize spending from the state General Fund or it can authorize payments of discernable amounts from a special fund.

In determining whether section 5 constituted an appropriation, the Court noted that statute requires employees to be paid all the wages, including accrued leave pay, due to the employee upon leaving the service of the employer. The Court found that this is an obligation to pay imposed by the statutes, but does not constitute an appropriation. The Court held that while the employment statutes may obligate the state to make certain payments, they do not set aside any sum of money from the public revenue and thus cannot be regarded as making an appropriation. Specifically in this case, section 5 neither authorized spending from the state General Fund nor did it authorize any defined amount of public revenue from any specific funding source. Section 5 was not an item of appropriation and could not be subject to the Governor's line item veto power, and was reinstated.

The Court also made other important findings in this case, one of which related to the justiciability of line item veto cases. In this case, the Governor argued that her decision to utilize her line item veto authority over an item of appropriation was a political question and therefore the Court could not hear the case. Political questions involve decisions that are made, according to the Constitution, by one of the political branches of government and thus raise issues that are not susceptible to judicial review. The Court noted that a Governor's decision whether to exercise a veto and a Legislature's decision whether to attempt a veto override are political questions, but that this case did not involve a political question. This case concerned the question of whether the Constitution permitted the Governor to exercise her veto power, which is a legal question.

This case is also noteworthy because, unlike the individual legislative members in *Rios*, the Court found that the legislative body had standing to sue. The Legislature sought and received authorization to challenge the Governor's actions and the Legislature alleged a particularized injury to the legislative body as a whole – the Legislature's authority to make and amend laws by a majority vote. Additionally, the Court found that failure to seek a veto override does not automatically exclude the

Legislature from bringing suit to challenge the Governor's line item veto when the challenge involves an allegedly unauthorized act by the Governor.

ADDITIONAL RESOURCES

- Cases: *47th Legislature v. Napolitano*, No. CV 06-0079 SA, 2006 WL 2613645, 486 Ariz. Adv. Rep. 36 (2006); *Bennett v. Napolitano*, 206 Ariz. 520, 81 P.3d 311 (2003); *Rios v. Syminton*, 172 Ariz. 3, 833 P.2d 20 (1992); *LeFebvre v. Callaghan*, 33 Ariz. 197, 263 P. 589 (1928); *Black and White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 218 P. 139 (1923); *Fairfield v. Foster*, 25 Ariz. 146, 214 P. 319 (1923); *Callaghan v. Boyce*, 17 Ariz. 433, 153 P. 773 (1915)
- Attorney General Opinion: I79-172 (R79-188)
- Law Review Articles: Daniel Strouse, *The "Item Veto" Case, Bennett v. Napolitano, What about the Merits?*, 37 Ariz. St. L.J. 165 (2005); Daniel Strouse, *The Structure of Appropriations Legislation and the Governor's Item Veto Power: The Arizona Experience*, 36 Ariz. L. Rev. 113 (1994)
- Arizona Constitution, Article V, Section 7